90-717

Supreme Court, U.S.
FILED
NOV 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES

RAY N. JACKSON

Petitioner

VS.

GENERAL DYNAMICS CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI
To The
SUPREME COURT OF TEXAS

Frank P. Hernandez
(Counsel of Record)
4319 Oak Lawn
Dallas, Texas 75219
(214) 520-7686

QUESTIONS PRESENTED

1. WERE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS VIOLATED IN THAT THE APPELLATE COURTS ABUSED THEIR DISCRETION, DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY NOT ALLOWING PETITIONER TO COMPEL THE TRIAL COURT REPORTER TO PREPARE THE STATEMENT OF FACTS, AFTER THE APPELLATE COURT HAD ORDERED THE COURT REPORTER TO DO SO ONCE THE COST OF THE STATEMENT OF FACTS WERE SECURED BY THE FILING OF THE APPROPRIATE APPEAL BOND?
2. WERE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS VIOLATED IN THAT THE ISSUES PRESENTED BY PETITIONER'S APPEAL ARGUMENTS ISSUES THAT WOULD CLEARLY REQUIRE A NEW TRIAL, IN A COMPARABLE CASE PRESENTED UPON ITS MERITS BY A NON-PRO SE LITIGANT?
3. WERE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS VIOLATED IN THAT AN OTHERWISE FAIR RULE OF PROCEDURE WAS USED BY THE APPELLATE COURTS TO EFFECT AN UNFAIR DENIAL OF EQUAL PROTECTION AND DUE PROCESS?

PARTIES

RAY N. JACKSON, Petitioner-Plaintiff

GENERAL DYNAMICS CORPORATION, Respondent-Defendant

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NO. _____

Supreme Court of the United States

RAY N. JACKSON

Petitioner

VS.

GENERAL DYNAMICS CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI

To The

SUPREME COURT OF TEXAS

Ray N. Jackson petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, Second Court of Appeals District of Texas, Fort Worth was unreported and is reproduced as Appendix "A." The Judgment of the Court of Appeals is reproduced as Appendix "B." The denial of Petitioner's Application for Writ of Error is reproduced at Appendix "C."

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3). The final order of the Supreme Court of Texas affirmed the 141st District Court, Tarrant County, Texas and was issued on June 6, 1990.

STATEMENT

This is a suit for damages in excess of $1,000.00. The Petitioner, Ray N. Jackson, pro-se, and informa pauperis in the 141st District Court of Tarrant County, Texas, brought suit against the Respondent, General Dynamics Corporation (G.D.) under Vernon's Texas Civil Statutes, Article 8307(c) of the Texas Worker's Compensation Act, alleging that he had been wrongfully terminated and discriminated against because he filed a worker's compensation claim. The trial of this cause

occurred on April 5, 1988. Petitioner was in court informa pauperis, but was represented by counsel at the time of trial.

At the conclusion of the trial, a jury verdict was issued in favor of the Respondent. Petitioner filed his Notice Of Appeal to the Texas Court of Civil Appeals, Second Appellate District of Texas, Fort Worth Division, in July, 1988. He petitioned the court to proceed on appeal, pro-se and informa pauperis. This Petition was challenged by the District Court Clerk of Tarrant County, Texas and despite overwhelming evidence of his poverty[1], the Tarrant County District Court denied his Petition to proceed informa pauperis.

Petitioner then prosecuted his right to proceed informa pauperis to the Texas Supreme Court. In order to protect his right to appeal and his rights under the law to proceed informa pauperis, Petitioner filed several motions which delayed the time for filing the cost bond, the transcript and the statement of facts in the Court of Appeals. Said delays were necessary and a prerequisite to protect his right to appeal while he prosecuted his right under the law to proceed on appeal informa pauperis.

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[1]Petitioners only earnings were $3847.00 plus expenses of $1115.30 for seven months of 1988. He submitted documents to show that he had been turned down for loans using his only personal property as security.

Each time his extensions of time to perfect his appeal were about to run out, he would request another extension in order to perfect the prosecution of his right to proceed informa pauperis and protect his right of appeal.

Respondent by motion to the Court of Appeals complained of the time taken by the Petitioner to pursue his opportunity to proceed, as being burdensome upon them. The Court of Appeals Ordered the Petitioner to perfect his appeal by November 10, 1988 or forfeit his right to appeal. The Petitioner timely perfected his appeal although he had tremendous difficulties to secure the proper appeal bond.[2]

After perfecting his appeal, Petitioner requested the District Court Clerk and the District Court Reporter to prepare and deliver the Transcript and the Statement of Facts to the Court of Appeals. The Court Clerk complied with Petitioner's request, but the District Court Reporter would not cooperate or comply.[3]

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[2]No bonding agent in the Petitioner's local area would give him an Appeal Bond because he was not an attorney. He ultimately was able to secure a cost bond through an out -of-town bonding agency in Houston, Texas.

[3]The court reporter, after not complying with the Order of the Court of Appeals to deliver the Statement of Facts, refused to sign an affidavit indicating what date he would be able to file the record. He requested that the Petitioner bring him a notary to his office or pay him five dollars to

Petitioner immediately petitioned the Court of Appeals to allow him a thirty day extension of time in order to compel the court reporter to prepare the statement of facts. He at the same time submitted an application for a Writ of Mandamus, but the Court of Appeals denied his motion and Ordered him to proceed on appeal with the Statement of Facts. In essence, punishing Petitioner for the court reporter's disobedience.

The actions of the Court of Appeals denied Petitioner the opportunity to complain of key issues, or all issues, of his appeal, except for his fundamental issue which did not require the record. Petitioner also complained that he was denied the Statement of Facts through no fault of his own and, therefore, under the Texas Rules of Civil Procedure and by the Constitution and case law, he was entitled to a new trial.[4]

Petitioner appealed to the Texas Supreme Court which, denied his writ. (Appendix C)

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sign the affidavit. He would not sign the affidavti when Petitioner secured another court reporter who was willing to notarize the affidavit at no cost. He estimated the average cost of the Statement of Facts at $4.50 per page while another court reporter estimated the average cost at $3.50 per page. He informed that his attorneys had advised him not to sign the affidavit. Shortly thereafter, Respondent submitted a motion to the Court of Appeals to dismiss the appeal and subsequently a Motion To Require Sufficient Bond To Pay Cost Of Record was filed.

[4]See Appellate Rule of Procedure, Rule 81(b)1 and 184(a); Rogers v. Rogers, 561 S.W.2d 172.

Petitioner filed a Motion For Rehearing and a Supplemental Motion For Rehearing complaining that the Appellate Court's actions denied him proper review and that the cause should be remanded for new trial; that the Appellate Court erred in its assessment of the importance of the cause; that the Appellate Court used an erroneous view of the law in its denial of his Statement of Facts and that the Appellate Court used an erroneous view of the law in deciding whether the District Court gave proper instructions to the jury.

REASONS FOR GRANTING THE WRIT

This is an important federal question concerning the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. It involves the denial of due process and equal protection due to the actions of the Court of Appeal's systematic denial of a pro-se litigant's right to appeal by denying him access to the Statement of Facts in the trial proceedings.

It has been established by this Court that the inhibitions of the Fourteenth Amendment includes all departments of the state government, including not only political, but judicial actions of the state. Moose Lodge v. Irvis, 407 U.S. 163, 32

L.Ed.2d 627, 29 S.Ct. 1665; Shelly v. Kraemer, 334 U.S.1, 92 L.Ed. 1171, 68 S.Ct. 836.

This court has further held in Burton v. Wilmington Parking Authority, 365 U.S. 315, 6 L.Ed. 2d ___, 81 S.Ct. 856, that whether the reach of the Fourteenth Amendment extends to particular cases can be determined only by shifting facts and weighing circumstances. See also, Evans v. Newton, 382 U.S. 296, 15 L.Ed. 373, 86 S.Ct. 416, on remand, 221 GA 870, 148 S.E.2d 324.

An essential test for the sufficiency of the Fourteenth Amendment was used by this Court when it held that due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated; equal protection, on the other hand emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable. See, Ross v. Mofitt, 147 U.S. 600, 945 S.Ct. 2437, 41 L.Ed.2d 725; Evitts v. Lucey 496 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821; Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 765 S.Ct. 585; Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814.

THE ACTIONS OF THE APPELLATE COURT DENIED THE FUNDAMENTAL FAIRNESS OF DUE PROCESS

Fundamental fairness required by the due process clause was violated in light of the following facts:

1. Petitioner had not one but two appeal bonds on file, totaling three times the ordinary appeal bond amount required.

2. The Court of Appeals enforced the exorbitant Appeal Bond in order to insure the payment of the Statement of Facts.

3. Petitioner's Motion To Compel would not have unduly burdened or delayed the court proceedings.[5]

4. Petitioner's only earnings were $3847.00, plus reimbursed expenses of $1115.30 for the seven month period of 1988.

5. It was undisputed that the right to proper review could not be preserved in any other way.

The epitome of the complained of circumstances of this case is that the actions of the Texas Appellate Courts, in

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[5]The Motion To Compel was denied in February, 1989. The submission of the case was scheduled for September, 1989. The court allowed Respondent a 30 day extension to file its Reply Brief in April, 1989.

denying Petitioner access to the Statement of Facts after his diligent efforts, under the law and the rules of court to protect his right to appeal and to post the proper appeal bond sufficient to pay the total cost of the Statement of Facts, despite his obvious poverty, amounted to the act of leading a horse to water, in good faith and pursuant to the rules, but refusing to allow him to drink the water once he is there.

The Appellate Court did not straight out deny Petitioner's appeal by dismissing it as motioned by the Respondent because there was no grounds for such a dismissal. The Appellate Court and the Respondent required Petitioner to strictly adhere to the rules and the law of the court. They strictly enforced the perfection of the appeal; they strictly enforced the filing of the Appeal Bond. They strictly enforced a higher cost Appeal Bond. Then, once all the requirements for appeal were met, they refused to allow him the Statement of Facts, without which normally there would be no appeal, except for the fundamental error, the only point of error considered by the Court.

A man cannot be said to be denied in a constitutional or in any rational sense, the privilege of resorting to court to

enforce his rights when he is given free access to the court for a length of time reasonably sufficient to enable an ordinary diligent man to institute proceedings for his protection. Canadian Northern v. Eglen, 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713.

However, in the case at bar, there is no evidence that the Petitioner was dilatory or abused the normal requirements necessary for the average man to take advantage of his appeal rights. The Petitioner was entitled under the rules of court and the law to appeal, and to prosecute his right to appeal informa pauperis through the Texas Supreme Court and even to this U.S. Supreme Court.

Therefore, for the Appellate Court or any official of the state to punish the Petitioner for what the law legally and plainly allowed him to do is a due process violation of the most basic sort. United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 LEd.2d 74; also see, Bordenkircher v. Hayes 434 U.S. 357, 98 S.Ct. 663, 668, 54 L.Ed.2d 604. For while an individual may be punished for violating the law, he just as certainly should not be punished for exercising a protected statutory or constitutional right. For an agent of the

state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconsititutional. Bordenkircher v. Haynes, supra, quoting Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714.

If the Appellate Court denied Petitioner's right to appeal because of his prosecution of his right to appeal informa pauperis under the law, then said rationale of the Appellate Court is unreasonable, arbitary, capricious and in opposition with the fundamental fairness of due process. The touchstone of due process is freedom from arbitrary government action. Ponte v. Real, 471 U.S. 491, 105 S.Ct. 2192, 85 L.Ed.2d 553; Wolff v. McDonnel, 418 U.S. 539, 41 L.Ed.2d 930, 94 S.Ct. 2963. The due process clause of the Fourteenth Amendment, like that of the Fifth Amendment, is intended to prevent government from abusing its power, or employing it as an instrument of oppression.

The actions of the Court of Appeals in denying Petitioner an opportunity to obtain the Statement of Facts when such was essential to the making of a meaningful appeal was more than arbitrary, it was blatent and obviously wrong;

shocking to a universal sense of justice. Kinsella v. United States, 361 U.S. 234, 4 L.Ed. 2d 286, 80 S.Ct. 297.

This Court has further held in a test for sufficiency of due process that applying the due process clause is an uncertain enterprise which must discover what fundamental fairness consist of in a particular situation by first considering the relevant precedents and then by accessing the several interests that are at stake. See, Lassater v. Department of Social Service, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640. See also, McCleskey v. Kemp, 753 Fed.2d 877, where this Court held that it must be accessed whether the procedure being used would lead to an erroneous decision.

In reviewing Petitioner's case, the first precedent of fundamental fairness in the particular situation complained of is that without a Statement of Facts the party is entitled to a new tiral. Texas law holds:

> Where due diligence has been exercised, an Appellant, who through no fault of his own is unable to obtain a proper record of the evidence, is entitled to a new trial where his right to have the case reviewed on appeal cannot be preserved in any other way. Ramon

v. Chavira, 586 S.W.2d 594; Southland Mower Co. v. Jordan, 587 S.W.2d 215; Fly v. Fly, 590 S.W.2d 179; Harris v. LeBon, 363 S.W.2d 184; Salazar v. Tower, 663 S.W.2d 713 (Tex. Sup.-1972); Rogers v. Rogers, 561 S.W.2d 172; Parris v. Johnson, 699 S.W.2d 361.

It is strikingly apparent that the Appellate Courts did not follow the given precedents in this situation. In all of the above cases, the litigants were represented by counsel. The treatment of the Petitioner in the instant case, being a pro-se litigant, reflects an air of disparate impact.

Second, the interest at stake in this situation is the right to appeal. After the Appellant had abided by all the requirements including the extra requirements of the sufficiency of the Appeal Bond to pay for the Statement of Facts, only to be denied such facts, denied the constitutional purpose of the right to appeal provided by the Texas State Constitution. Without the Statement of Facts, the right to appeal provided by the state is no more than a meaningless ritual.

Third, the accessment of the denial of the Statement of Facts, when in most cases there can be no appeal without the Statement of Facts, is obviously unfair and a denial of due process by any rational sense of reasoning.

THE ACTIONS OF THE APPELLATE COURTS DEFIES APPLICABLE STATUTES

The Rules of Appellate Procedure, Rule 84(b)(1) clearly states that if the Texas Court of Appeals or the Texas Supreme Court should reverse and order a new trial if the Trial Court has committed an error of law in the course of the trial, and if such an error complained of probably prevented the Appellate from making a proper presentation of the case to the Appellate Court. The appropriate case law as cited above seems to indicate that said Rule 84(b)(1) and 181(b) of the Rules of Appellate Procedure applies when the Appellate is denied the Statement of Facts through no fault of his own, whether it was the fault of the court reporter in the Trial Court or of the Court of Appeals. When the application of the Rules of Appellate Procedure, Rule 84 and Rule 181 upheld, then the

Appellate Court's action were contrary to the Texas Rules of Appellate Procedure.[6]

THE ACTIONS OF THE APPELLATE COURT DENIED EQUAL PROTECTION OF THE LAW

The right to an appellate review is not inherent or inalienable, in the sense that one has an inherent right of access to the appellate courts. But the right to appeal provided by the constitutional provisions authorizing appellate review has been liberally conferred within the laws.[7] Thus, where the right to appeal is guaranteed by the Constitution, neither the courts nor the legislature can take such right away, and a party who considers himself aggrieved may appeal as a matter of right , even if he cannot afford to pay the cost of appeal. It is the policy of law to secure citizens of state employment of the right to appeal. While it is not a constitutional requirement to provide a system of appellate review, once an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the

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[6] The Texas Supreme Court has held that the Rules of Appellate Procedure have the same force and effect as statutes and are not to be ignored. Missouri Pacific v. Cross, 501 S.W.2d 868.

[7] For purposes herein, see the Texas Constitution Article V, Sections 3 and 6.

Equal Protection Clause of the Fourteenth Amendment. Lindsey v. Normet, 405 U.S. 56, 31 L.Ed.2d 36, 92 S.Ct. 862; Ross v. Mofitt, 147 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 725; Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, Rinaldi v. Yeger, 384 U.S. 305, 86 S.Ct. 1497; Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372.

In another test by this Court of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, this Court ruled that when a state distributes benefits unequally, the distinction it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally a law, or an action, will survive the scrutiny if the distinction it makes rationally furthers a legitimate purpose. Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2308, 72 L.Ed.2d 672; Hooper v. Bernalillo, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487.

In comparison,the case before this Court does not meet the above test of furthering a legitimate state purpose. It is inconceivable that the denial of what may be considered a vested right to appeal could further a state's interest.

Pointing to another test for sufficiency of the Fourteenth Amendment, this Court held that if claims involving violations of the equal protection rights based on selective prosecution, which generally require a showing of discriminatory effect and purpose, no showing of discriminatory intent is necessary when the equal protection claim is based on an overt discrimination classification. Whyte v. U.S., 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 574, Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664. In comparison to the instant case, the actions of the Appellate Courts are obvious. The Petitioner broke no court rules; he complied with the orders of the court; he was not dilatory, nor was the time of the court at risk of being short. Yet the courts denied him an opportunity to compel the court reporter to obey the court's orders, thereby denying a sufficient record on appeal which in-turn denied proper review upon appeal.

CONCLUSION

The actions of the appellate court below have failed to satisfy the reasonably applicable test for sufficiency of due process and equal protection clauses of the Fourteenth Amendment. The most applicable test associated to

Petitioner's case is Griffin v. Illinois, supra, where this Court ruled that the denial of a transcript of the trial court procedure violated both the due process and equal protection clauses of the Fourteenth Amendment.

It appears, when reviewing the circumstances of this case, that the appellate courts discriminated against the Petitioner because he was not represented by an attorney. There was no other logical or business reason that would further a legitimate government purpose. Therefore, the Petitioner herein must have a fair opportunity to adjudicate his appeal upon its merits by access to a trial court record. This is especially so in a situation where the Petitioner has secured cost for the court records. The decision of the appellate courts should be remanded and a new trial ordered.

Respectfully submitted,

LAW OFFICES OF
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(214) 520-7685

FRANK P. HERNANDEZ
TBC #09516000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to attorney for Respondent, Gary Thompson at 1300 Continental Plaza, Fort Worth, Texas 76102, via United States Mail, postage pre-paid, on this the _____ day of _____, 1990.

_____
FRANK P. HERNANDEZ

AFFIDAVIT OF COUNSEL AS TO MAILING OF WRIT OF CERTIORARI

I, Frank P. Hernandez, counsel for Ray N. Jackson, Petitioner, swear that the foregoing petition was deposited in the United States Mail, with the proper postage, on March _____, 1990.

_____
FRANK P. HERNANDEZ

STATE OF TEXAS §
COUNTY OF DALLAS §

Sworn to and subscribed before me, a notary public by the said Frank P. Hernandez, on this _____ day of _____, 1990 to which witness my hand and seal of office.

_____
NOTARY PUBLIC IN
AND FOR THE STATE
OF TEXAS

APPENDIX A

NO. 2-88-160-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

RAY N. JACKSON APPELLANT

V.

GENERAL DYNAMICS CORPORATION APPELLEE

FROM THE 141ST DISTRICT COURT OF TARRANT COUNTY

OPINION

This case is an appeal from a take-nothing jury verdict in a worker's compensation case on the issue of wrongful termination. There is no statement of facts. Jackson appears pro se alleging one point of error. In his point of error he argues the trial court erred in refusing to give proper claifying instructions in response to a jury not request such from the court. It is not necessary to discuss the specifics of his point in deciding this case, for no error is properly before us. We affirm.

In his point of error, Jackson says the jury sent out a note seeking clarification of some of the evidence,[1] and the court incorrectly answered the note.[2] We have considered the note and the court's instruction in response, and find no error.[3]

There is no statement of facts, and therefore no way for us to determine if Jackson objected to the act of the court. Without objection, any error in the charge or court's instruction is waived. TEX. R. CIV. P. 272; see also Green v. Evans, 362 S.W.2d 377, 380 (Tex. Civ. App.--Dallas 1962, no writ).

Jackson argues that the court's reply to the note was fundamental error, but he cites no authority for this proposition. He argues that a court's failure or refusal to give an adequate instruction that properly states the law is reversible error "and may be contrary to the Rules of Procedure." The cases he cites are not on point.

With no record showing any error of the court, and no showing of any objection to the court's action, nothing is

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[1] The jury asked: "If we think Ray would not have lasted w/G.D. do we consider this."

[2] The court's response was: "I cannot consider this question."

[3] The note and response are filed with the court in a Third Supplemental Transcript, although we have no statement of facts filed.

error "and may be contrary to the Rules of Procedure." The cases he cites are not on point.

With no record showing any error of the court, and no showing of any objection to the court's action, nothing is presented for review. TEX. RU. APP. P. 52. His point of error is without merit, and is overruled.

The judgment is affirmed. Costs are assessed against appellant.

JOE SPURLOCK II
JUSTICE

PANAL A
WEAVER, C.J.; SPURLOCK II AND MEYERS, JJ.
DO NOT PUBLISH
TEX. R. APP. P. 90(E)

OCTOBER 25, 1989

APPENDIX B

NO. 2-88-160-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

Ray N. Jackson

v.

General Dynamics Corporation

From the 141st District Court of Tarrant County (141-83360-84)

October 25, 1989

Opinion by Justice Spurlock II (NFP)

JUDGMENT

This Court has considered the record on appeal in this case and is of the opinion that there was no error in the judgment of the trial court. It is ordered, adjudged and decreed that the judgment of the trial court is affirmed.

It is further ordered that appellant, Ray N. Jackson and his surety, Universal Surety of America, pay all costs of this appeal, for which let execution issue, and that this decision be certified below for observance.

signed JOE SPURLOCK II

APPENDIX C

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 21, 1990

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RE: Case No. C-9374

STYLE: RAY N. JACKSON
V. GENERAL DYNAMICS CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as supplemented, with the notation, Writ Denied.

Respectfully yours,

John T. Adams, Clerk

By Blana E. Morin, Deputy

cc: Mr. Ray N. Jackson
4933 Ramey Ave.
Fort Worth, TX 76105

Supreme Court, U.S.
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DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-717

In The

Supreme Court of the United States

October Term, 1990

RAY N. JACKSON,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner claims the following issues should be considered by the Supreme Court. It is the Respondent's position that none of them merit review by the Supreme Court.

1.

Whether Petitioner who was found not to be a pauper has a Fourteenth Amendment right to have a statement of facts prepared without paying the cost as required by Texas procedural rules.

2.

Whether Petitioner's Fourteenth Amendment rights were violated because he was not able to prosecute his appeal pro se as well as an attorney.

3.

Whether Petitioner's Fourteenth Amendment rights were violated in the application of an otherwise fair rule of procedure by the appellate courts requiring Petitioner to pay the cost of a statement of facts.

LIST OF PARTIES

1. The Petitioner herein, Ray N. Jackson.
2. The Respondent herein, General Dynamics Corporation.

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No. 90-717

In The

Supreme Court of the United States

October Term, 1990

RAY N. JACKSON,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, Second Appellate District of Texas in Fort Worth, Texas and the denial of Petitioner's Application for Writ of Error by the Supreme Court of Texas are reproduced at Appendix A and C in Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Respondent would urge that the questions presented by Petitioner are not such that merit the judicial discretion of this Court in accordance with Rule 17 of the Rules of the Supreme Court of the United States.

STATEMENT OF CASE

Many facts in Petitioner's Statement are not accurate and, in fact, depict in a false light the actions of both Respondent and the Texas courts.

This is a suit filed by Petitioner seeking to recover a money judgment for what he alleged to be his wrongful termination by Respondent under the Texas workers' compensation laws. Although Petitioner filed suit and has prosecuted part of this appeal *pro se*, during the actual trial of this matter before a jury, he was represented by an attorney of his own choosing. After hearing all the testimony from both parties, the case was submitted to a jury of his peers which found that Petitioner was not wrongfully terminated by Respondent, and a take-nothing judgment was entered.

From that judgment and the jury's findings, Petitioner sought review by the court of appeals in Fort Worth. At the same time, he correctly began the procedure to prosecute the appeal *in forma pauperis* and, thus, be excused from paying the cost of an appeal.[1] A contest

[1] TEX. R. APP. P. 40(a)(3)(A); requires the filing of an affidavit of inability to pay.

to that pauper's affidavit was filed by the Tarrant County District Clerk's office and an evidentiary hearing was held before the trial court.

After the court decided the Petitioner was not entitled to proceed *in forma pauperis*, Petitioner sought review of that decision through mandamus to the court of appeals. A transcript of the proceedings of the *in forma pauperis* hearing was ordered by the appellate court without cost to the Petitioner to be considered in determining the Petitioner's ability to pay costs. After review of the facts, the court of appeals denied Petitioner leave to file his petition for writ of mandamus; thus, affirming the trial court's finding that Petitioner was not a pauper and was able to pay the cost of this appeal.

Petitioner then sought review by the Supreme Court of Texas of this decision by the trial court and the court of appeals on his motion to proceed *in forma pauperis*. Like the court of appeals, the Supreme Court of Texas considered the facts and denied Petitioner leave to file his petition for writ of mandamus.

Throughout this mandamus process, the court of appeals extended the time to file the appeal bond, the transcript and the statement of facts so that Petitioner could avoid payment of costs. After it was determined Petitioner could pay the costs of appeal, Petitioner was able to obtain a cost bond in an amount in excess of that required by Texas law.[2]

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[2] TEX. R. APP. P. 46(a); this rule requires the appellant to execute a bond in the sum of $1,000. After Petitioner's original

(Continued on following page)

Also contrary to Petitioner's statement, Respondent filed only one response to this multitude of extensions, and that was only after several extensions had already been granted and mandamus of *in forma pauperis* hearing had already been denied by the court of appeals. Despite this response by General Dynamics Corporation, the Fort Worth Court of Appeals granted that motion, as well as numerous subsequent motions to extend without further response.

Petitioner also incorrectly states that the court of appeals ordered the court reporter to prepare and deliver the statement of facts. It was Petitioner who failed to take the necessary steps required by the Texas rules and fulfill his duty to file the statement of facts with the Clerk of the Court of Appeals.[3] Since Petitioner was able to pay for the costs of appeal and, in fact, did get an appeal bond filed, Petitioner was the only one at fault in failing to file a statement of facts in the appellate court almost eleven months after the trial court entered its judgment. Therefore, no one denied Petitioner's right to a statement of facts in this case other than himself.

After all the delays and reviews of Petitioner's *in forma pauperis* proceeding, the only issue actually raised by Petitioner before the court of appeals was whether the trial court erred in failing to clarify a special issue after the jury submitted a question during its deliberation. The

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(Continued from previous page)

bond was found not properly conditioned and stricken, Petitioner filed another bond for $2,000 to replace the one stricken.

[3] TEX. R. APP. P. 53(k) and 46(e).

court of appeals found the alleged error without merit and affirmed the trial court's judgment.[4]

Thereafter, Petitioner appealed the court of appeals' decision and, for the first time, complained that he was denied equal protection of the law by not allowing him to compel the court reporter to prepare a statement of facts without paying the costs. Petitioner once again urged his only substantive error with regard to the trial court's refusal to give subsequent instructions to the jury while they were deliberating their verdict. After review of the briefs and the record, the Supreme Court of Texas denied Petitioner's application for writ of error.[5] Therefore, the trial court's judgment was again affirmed.

REASONS FOR DENYING THE WRIT

This case presents no novel or important question for this Court's consideration. The ultimate issue presented by Petitioner is whether a person is entitled to demand a statement of facts without cost after it has been determined and reviewed by the Texas courts that he was not a pauper and could afford to pay the costs. This case simply presents no issue of a denial of equal protection or due process guaranteed by the Constitution; rather, there remains only a complaint by Petitioner about the factual findings of the Texas courts with regard to Petitioner's ability to pay the costs of his appeal.

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[4] See Appendix A to Petitioner's Brief.

[5] See Appendix C to Petitioner's Brief.

Simply stated, Petitioner wants this Honorable Court to review the factual findings of the trial court, court of appeals and Supreme Court of Texas and reconsider the issue of his ability to pay for the cost of appeal, including the statement of facts. The issue of whether Petitioner should have to pay costs on appeal pursuant to Rule 40 of the Texas Rules of Appellate Procedure was heard by the trial court and reviewed via a petition for writ of mandamus by the Fort Worth court of appeals (Cause No. 2-88-176 CV). The Fort Worth court of appeals even ordered and reviewed a statement of facts of the *in forma pauperis* hearing before the trial court at no cost to Petitioner.

After Petitioner was denied leave to file his writ of mandamus in the court of appeals, Petitioner filed another motion for leave to file a petition for writ of mandamus in the Supreme Court of Texas. Once again, Petitioner asked the supreme court to re-review the order denying his request to be considered a pauper and not pay any costs on appeal. The supreme court, after reviewing the motion, also refused to overturn the trial court's determination that Petitioner was able to pay costs. Petitioner has been given equal protection and full due process.

Petitioner has also argued that he was denied the fundamental fairness of due process because of five acts by the court of appeals. However, Petitioner's complaints are unjustified and, in fact, Petitioner completely misstates the true facts surrounding the actions of the court of appeals.

First, Petitioner states that he was required to file "two appeal bonds" of an "exorbitant" amount. Both assertions are unfounded. Petitioner has only had on file one appeal bond at a time since the originally filed bond was not proper and was stricken by the court.[6] Likewise, Petitioner's complaint that he was required to file an "exorbitant bond" is without merit in fact or law. No order of the court of appeals or even a request by Respondent ever required Petitioner to file more than the minimum $1,000 cost bond required by Texas Rules of Appellate Procedure 46(a). After Petitioner's original bond was determined to be not improper, Petitioner filed a properly conditioned bond in the amount of $2,000 on his own and without any motion, request or order of any kind. Although $2,000 is hardly exorbitant, no action by either the court of appeals or Respondent required Petitioner to file a bond in that amount.

As pointed out earlier, it was Petitioner's obligation to pay for the statement of facts and see to its filing. Petitioner's other complaints again rehash the court of appeals' decision that he was not a pauper and argues that the court was somehow being unfair and denying Petitioner due process of the law by requiring him to abide by the rules of court. An evidentiary hearing on Petitioner's ability to pay for the cost was held and reviewed by the Texas courts. Petitioner was given adequate due process through that proceeding, and further

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[6] See Order striking original bond for failure to comply with TEX. R. APP. P. 46(a) at Appendix A attached to Respondent's Brief.

hearings or delays on the payment of costs for the statement of facts would simply be inappropriate and another unnecessary delay. Petitioner really has no argument that he was treated unfairly since the court had already extended the time for filing the statement for almost eleven months from the date a judgment was rendered in the trial court. Every level of courts in Texas has reviewed these decisions.

It is extremely significant that Petitioner has not questioned the constitutionality of the *in forma pauperis* procedures provided by Texas law.[7] In fact, Petitioner never even cites those rules in his brief. Those proceedings provide for an evidentiary hearing on appellant's ability to pay costs or any part of the costs. TEX. R. APP. P. 40(a)(3)(C) and (D). Furthermore, once it is determined that a party is unable to pay costs, a free statement of facts is provided. TEX, R. APP. P. 53(j)(1). Petitioner is not being punished or deprived of a single right granted by Texas law and, therefore, no due process violation has occurred. In fact, Petitioner exercised every right and privilege under the Texas rules. The facts presented simply did not justify his position.

Petitioner's reliance on *United States v. Goodwin*, 457 U.S. 368 (1982) and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) is simply unfounded. Petitioner cites broad rules of law that have no bearing on his particular complaint. Quite to the contrary, Petitioner has in no way been denied a meaningful opportunity to be heard. *See Boddie v. Connecticut*, 401 U.S. 371 (1971).

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[7] TEX. R. APP. P. 40(a)(3).

Furthermore, the actions of the Texas courts were neither unreasonable, arbitrary nor capricious. *Compare Ponte v. Real*, 471 U.S 491 (1985); *Wolff v. McDonnell*, 418 U.S. 539 (1974). Petitioner was given and actually utilized the right to be determined a pauper. Again, Petitioner does not challenge the *in forma pauperis* proceeding utilized in Texas. Petitioner seeks only to question the factual findings of the Texas courts that he was not a pauper and able to pay his costs.

Finally, Petitioner argues that fundamental fairness under Texas law requires a new trial when a statement of facts is not provided.[8] However, even the cases cited by Petitioner require that his inability to obtain a statement of facts be "through no fault of his own."[9] Texas rules clearly provide that Petitioner is responsible for requesting and paying for a statement of facts even if a bond is filed. TEX. R. APP. P. 46(e) and 53(k). There has simply been no showing of any effort by Petitioner to obtain a statement of facts other than simply seeking to avoid paying his costs altogether.

It is also interesting to note that Petitioner did not even request that a statement of facts be prepared until December 5, 1989, some seven months after judgment had been entered in this case. The court of appeals was overly fair with Petitioner in its loose application of rules, and only after numerous extensions and motions did the court of appeals refuse to delay the appeal further in February of 1989. The only one at fault in this matter is Petitioner.

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[8] See Petitioner's Brief at 12.

[9] *Id.* at 12 and 13.

Simply stated, Jackson has demanded a free ride throughout all these proceedings with minimal or no cost or expense to him, while Respondent has been put to great cost and expense to defend what it considers a meritless and merely harassing case originally filed in 1984. The jury found absolutely no liability on the part of General Dynamics Corporation, and the court of appeals affirmed the trial court, finding no error in the judgment. The Supreme Court of Texas also found no basis to reverse the trial court's decision with regard to either the judgment or the Petitioner's ability to pay costs. Therefore, Petitioner's complaints are without merit, and this Court should refuse Petitioner's petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari filed by Petitioner Ray N. Jackson should be denied.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS

FOR THE SECOND APPELLATE DISTRICT OF TEXAS

Ray N. Jackson	)	
	)	No. 2-88-160-CV
vs.	)	
	)	
General Dynamics Corporation	)	

ORDER

On this day came on to be considered the first motion of appellee, General Dynamics Corporation, to strike the appeal bond.

The motion is GRANTED. A new appeal bond with sufficient conditions in surety is to be filed, pursuant to Rule 49, Tex. R. App. P. by December 29, 1988.

The Clerk of this Court is directed to transmit a copy of this order to the attorneys of record, clerk of the trial court and and court reporter.

SIGNED THIS 9th day of December, 1988.

/s/ David Farris
DAVID FARRIS
JUSTICE

XSFACT.CV

JAN 3 1991
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 90-717

SUPREME COURT OF THE UNITED STATES

RAY N. JACKSON

Petitioner

VS.

GENERAL DYNAMICS CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF TEXAS

PETITIONER'S REPLY BRIEF

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NO. 90-717

SUPREME COURT OF THE UNITED STATES

RAY N. JACKSON

Petitioner

VS.

GENERAL DYNAMICS CORPORATION

Respondent

QUESTIONS PRESENTED

1. WHETHER PETITIONER'S FOURTEENTH AMENDMENT RIGHTS WERE DENIED WHEN HE WAS DENIED ACCESS TO THE STATEMENT OF FACTS VIA NO FAULT OF HIS OWN; WHEN HE COULD NOT PROSECUTE HIS APPEAL IN ANY OTHER WAY; AND HAD SECURED THE COST OF THE STATEMENT OF FACTS?

2. WHETHER THE COURT OF APPEALS USED AN OTHERWISE FAIR RULE OF PROCEDURE TO EFFECT AN UNFAIR DENIAL OF EQUAL PROTECTION AND DUE PROCESS?

PARTIES

RAY N. JACKSON, Petitioner-Plaintiff

GENERAL DYNAMICS CORPORATION,
Respondent-Defendant

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NO. 90-717

SUPREME COURT OF THE UNITED STATES

RAY N. JACKSON

Petitioner

VS.

GENERAL DYNAMICS CORPORATION

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF TEXAS

PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

This is a suit for damages in excess of $1,000.00, as stated on Page 2 of Petitioner's Petition for Writ of Certiorari to the Supreme Court of Texas and filed in this court. Petitioner's case was properly before the trial court, the Court of Appeals, the Supreme Court of Texas, and is properly before this court. The record before the Texas Appellate Courts will show the following facts:

1. The Petitioner has two fully negotiable appeal bonds on file; one for $1,000.00 and one for $2,000.00, estimated cost of statement of facts by the court reporter.[1]

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[1]Contrary to Respondent Brief in Opposition at Page 7, the Texas Rule of Appellate Procedure (TRAP) Rule 49(c) states in part as follows: "The additional security shall not release the security previously posted."

2. The Petitioner submitted his request to the court reporter to prepare the statement of facts by the filing date; the court reporter failed to do so.

3. On December 29, 1988, Petitioner perfected his appeal a second time by filing the additional appeal bond pursuant to the December 9, 1988 order of the Texas Appellate Courts (See Appendix A of Respondent Brief in Opposition).

4. Subsequently, the Court of Appeals ordered a new filing date of February 8, 1989 for the statement of facts. A copy of said order was ordered by said court to be mailed to the court reporter by the clerk of the Court of Appeals.

5. The court reporter did not prepare the statement of facts by February 8, 1989.

6. When the court reporter did not respond by February 8, 1989, Petitioner immediately filed his motion to extend the time for 30

days, along with his motion to compel the court reporter to prepare the statement of facts.

7. The Texas Court of Appeals denied Petitioner's motions and ordered him to proceed on appeal without the statement of facts.

REASONS FOR GRANTING THE WRIT

This is an important federal constitutional question concerning the due process and equal protection clause of the Fourteenth Amendment to the Constitution of The United States. It involves the denial of a pro-se litigant's right to appeal by denying him access to the statement of facts, after said court had improperly required the petitioner to secure the cost of the statement of facts via. extra appeal bond, pursuant to the Texas Rules of Appellate Procedure Rule 49. Respondent's Brief in Opposition at Page 7 states that Petitioner was not required to pay the extra

bond and he did it upon his own, yet at Appendix A of Respondent's brief is an order requiring Petitioner to post the extra bond pursuant to Rule 49 Texas Rules of Appellate Procedure by December 29, 1988.[2]

THERE IS NO EVIDENCE THAT PETITIONER WAS NEGLIGENT OR AT FAULT IN OBTAINING THE STATEMENT OF FACTS

Contrary to Respondent's Brief in Opposition, there is no showing that Petitioner was negligent or at fault in obtaining the statement of facts. Whether the Petitioner wanted a free ride is not an issue. The cost of the statement of facts was secured. If said security was not enough, then it was the responsibility of the court reporter, not the Respondent, to file a motion to increase the

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[2]Rule 49(c) Texas Rules of Appellate Procedure states that unless Petitioner post additional bond within 20 days, his appeal will be dismissed.

amount of cost bond. Palacio v. Johnson, 663 S.W.2d 490 (Tx. App. 1 Dist. 1983).

The Texas Court of Appeals for the First District of Houston, Texas further held that the official court reporter is compensated as an official of the state for the performance of her duties, including the recording of proceedings for appellate review. The court reporter has no right to payment as a condition precedent to her official duty of preparing the statement of facts. The court reporter has a mandatory duty to prepare the statement of facts upon request. Palacio v. Johnson, supra; Alexander v. Bowen, 581 S.W.2d 714, 715 (Tx. App. Dallas, 1979).

If the court reporter will not prepare the statement of facts, the Petitioner has no control over that court reporter. The only thing that an appellant can do is to request leave from the Court of Appeals. The Court of Appeals has constitutional jurisdiction over the situation. Palacio v. Johnson, supra; O'Neal v. Stoval, 580

S.W.2d 130, 132 (1980). The Petitioner fulfilled every rule of civil procedure required of him to obtain the statement of facts.

THE COURT OF APPEALS IMPROPERLY DENIED THE PETITIONER ACCESS TO THE STATEMENT OF FACTS

The Court of Appeals ordered the Petitioner to post an additional appeal bond to pay the cost of the statement of facts in the trial court pursuant to the Texas Rules of Appellate Procedure Rule 49 upon the motion of the Respondent to strike the original appeal bond.[3] Unless the attorneys for the Respondent were representing the trial court reporter or the Respondent had a vested interest in the payment for the statement of facts, the actions of the Court of Appeals were arbitrary and effected an unjust denial of Petitioner's fourteenth amendment rights of equal protection and due process by its improper use of an otherwise fair and impartial Appellate Rule of Procedure.

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[3] See Appendix A of Respondent's Brief in Opposition

TRAP, Rule 49 states in part as follows:

> "Sufficiency of a cost or supersede as bond or deposit or sureties thereon or any other bond or deposit under Rule 47 shall be reviewable by the Appellate Court for insufficiency . . . "

However, TRAP, Rule 47 states that a judgement debtor may file a sufficient bond payable to the judgement creditor. Respondent was not a judgement creditor with respect to the cost of the statement of facts. Therefore, the Texas Court of Appeals had no jurisdiction to require Petitioner to post an additional appeal bond upon the motion of the respondent.[4]

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[4]Had the court reporter desired additional security for the payment of his fee, his proper relief is prescribed by Texas Rules of Civil Procedure 354, by filing a motion to increase the amount of the cost bond with the trial court. Palacio v. Johnson, 663 S.W.2d 490, 492 (Tx. App. 1983).

Further, if this cause against the Respondent was indeed frivolous or meritless, as stated in the Respondent's Brief in Opposition, the Respondent at anytime during the trial court's proceedings could have made a motion to said court to dismiss this action just as easily as it made its motion to strike the appeal bond.

Wherefore Petitioner's complaints and Petitioner's appeal is not without merit, this court should disregard the Respondent's Brief in Opposition and should grant Petitioner's Writ for Certiorari to The Supreme Court of Texas and reverse said court and order a new trial.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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